88-676

APPENDIX

Supreme Court, U.S.
FILED
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NUMBER:

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JERRY W. IKARD, D/B/A
IKARD MANUFACTURING COMPANY

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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STATEMENT OF CONTENTS OF APPENDIX

I certify that the contents of the appendix to be filed in conjunction with this Writ of Certiorari, appeal, in accordance with Rules of the Supreme Court of the United States Rule 21 (k) and contains the following portions, and only the following portions, of the record below:

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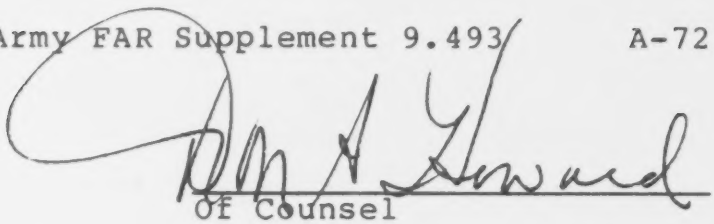

Of Counsel

1. The Order of the 11th Circuit Court of Appeals from which this Writ of Certiorari derives.

Entered June 30, 1988.
Issued as Mandate July 26, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-7043

D.C. Docket No. 87-5267

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee,

Appeal from the United States District Court for the Northern District of Alabama

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(June 30, 1988)

Before HATCHETT and EDMONDSON, Circuit Judges, and GIBSON*, Senior Circuit

Judge.

PER CURIAM:

AFFIRMED. See Circuit 36-1. "Costs taxed against plaintiff-appellant."

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*Hon. Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Judgement entered: June 30, 1988
For the Court: Miguel J. Cortez, Clerk

By: Warren A. Godfrey
Deputy Clerk

Issued as Mandate: July 26, 1988

2. The Order of the United States District Court in the Northern District of Alabama, Northeastern Division, dismissing Petitioner's Complaint Entered December 31, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

ORDER

The above entitled civil action brought by plaintiff Jerry W. Ikard d/b/a Ikard manufacturing Company against the defendant United States of America ("United States")[1] is before the Court upon the 12(b)(1) and (6) Motion to Dismiss filed herein by the

defendant United States on August 17, 1987. In support thereof, the United States alleges as follows:

> 2. Plaintiff has failed to satisfy the FTCA requirement of showing that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b).
>
> 3. Alternatively, Plaintiff's allegations all rise out of tortious interference with contract rights and misrepresentation, both of which are expressly excepted from the provisions of the FTCA, 28 U.S.C. Section 2680(h).
>
> 4. Furthermore, plaintiff's allegations involve the Government's exercise of discretionary function and are subject to the exception under 28 U.S.C. Section 2628(a).

and submits memorandum of law in support thereof. Plaintiff filed memorandum brief in opposition to defendant's motion on September 3, 1987.

Upon consideration, the Court is of the opinion that defendant's 12(b)(1) and (6) motion to dismiss is due to be granted for the reasons and alternative reasons stated in the memorandum of law submitted by the United States which the Court hereby adopts as its own. It is therefore

ORDERED that the 12(b)(1) and (6) motion to dismiss of the defendant United States of America be and the same hereby is GRANTED. And it is further

ORDERED that the above entitled civil action be and the same hereby is DISMISSED with costs taxes against plaintiff, for which let execution issue.

DONE AND ORDERED this 31st day of December, 1987.

Signature

E.B. HALTOM, JR.
UNITED STATES
DISTRICT JUDGE

---

1 Plaintiff asserts his claims for relief under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b).

3. Defendant-Respondent's Memorandum of Law Supporting its Motion to Dismiss Which Was Adopted by the Order of the United States District Court in the Northern District of Alabama, Northeastern Division, as Its Own.
Dated August 17, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Plaintiff is the sole owner of a manufacturing company located in Meridianville, Alabama, which produces parts for various federal defense agencies, pursuant to contracts with

the federal government. Plaintiff's primary customer is the United States Army Missile Command at Redstone Arsenal, Alabama. On June 16, 1987, Plaintiff filed the present action against the United States seeking monetary damages. The complaint alleges de facto debarment, inequitable debarment and suspension, negligent failure to comply with the Small Business Act and Federal Acquisition Regulations, interference with prospective advantage, and delayed processing of a security clearance by various unnamed employees of the federal government. Plaintiff seeks recovery under the Federal Tort Claims Act (FTCA), 28 U.S.C. Section 1346(b). For the reasons set out below, defendant respectfully submits

that plaintiff has failed to comply with the FTCA, in that he has not shown that the United States, if a private person, would be liable to plaintiff under Alabama law. Alternatively, his action is barred by statutory exceptions to the FTCA, 28 U.S.C. Sections 2680(a) and (h).

The FTCA states, in pertinent part, that the district court shall have the jurisdiction over

> "...civil actions on claims against the United States for money damages for injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. Section 1346(b)." (emphasis added.)

The plaintiff alleges that the government's actions constituted

negligence per se, interference with prospective economic advantage, misrepresentation and unconstitutional denial of due process. However, before plaintiff can proceed with this action, plaintiff must allege a tort cognizable under Alabama Law. 28 U.S.C. Section 1346(b), supra. Defendant submits that plaintiff has failed to state such a cognizable claim.

Plaintiff's primary contention is that he was "black-listed" and debarred from the list of eligible government contractors as a result of the government's violations of applicable federal procurement regulations, and that these violations constitute negligence and negligence per se.

In Art Metal-USA, Inc. v. United States, 753 F.2d 1151 (D.C. Cir. 1985), the plaintiff contended that it had been unlawfully debarred from further government contracts. Specifically, it alleged, as in the present case, that government officials had failed to comply with procedural requirements set forth in federal debarment regulations. The District of Columbia Circuit stated:

> "We begin our analysis with the well- established principle that the violation of a federal statute or regulation by government officials does not of itself create a cause of action under the FTCA. See Canadian Transport Co. v. United States, 663 F.2d 1081, 1091 (D.C.Cir. 1980) ("Not every violation by the government of its regulations will give rise to an action under the Tort Claims Act.") See also Sellfors v. United States, 697 F.2d 1362, 1365-67 (11th Cir. 1983) (violation of a federal regulation does not automatically invoke state law principles of negligence per se), cert. denied, _____ U.S. _____, 104

S.Ct. 3571, 82 L.Ed.2d 870 (1984); Schindler v. United States, 661 F.2d 552, 560 (6th Cir. 1981) ("usually the federal regulatory statute is not the source of a private right of action"); United Scottish Insurance Co. v. United States, 614 F.2d 188, 194 n.4 (9th Cir. 1987) ("[T]he existence of a federal statutory duty does not of itself create a duty to be vindicated by the Act."), aff'd after remand, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, _____ U.S. _____, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984); Zabala Clemente v. United States, 567 F.2d 1140, 1149 (1st Cir. 1977) ("[E]ven where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability."), cert. denied, 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978); United States v. Smith, 324 F.2d 622, 624-25 (5th Cir. 1963)". "This is because the FTCA, by its terms, does not create new causes of action; rather, it makes the United States liable in accordance with applicable local tort law. Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978). Duties set forth in federal law do not, therefore, automatically create duties cognizable under local tort law. The pertinent inquiry is whether the duties set forth in the

federal law are analogous to those imposed under local tort law. See Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957)."

Art Metal at 1157-58.

In affirming the lower court's dismissal of Art Metal's complaint for failure to state a claim under the FTCA, the District of Columbia Circuit found

"...that GSA officials failed to give Art Metal the process due it under the procurement regulations. Because the regulations do not embody duties recognized under District of Columbia tort law, however, they do not assist Art Metal in this FTCA action. An examination of the regulations indicates that they essentially impose duties on GSA officials to deal fairly with government contractors. Moreover, the "fairness duties" are required of the government as a government under the due process clause of the United States Constitution. See Gonzales v. Freeman, 334 F.2d 570 (D.C.Cir. 1964). As Art Metal itself recognizes, the regulations are

> "designed to protect contractors' due process rights, liberty interests, and economic interests from an arbitrary, capricious, unfair, or incorrect debarment." Brief for Appellant at 33. These constitutional rights are guaranteed under federal law. Thus an alleged violation of these rights is not remediable under the FTCA. Brown v. United States, 653 F.2d 196 (5th Cir. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1920, 72 L.Ed.2d 440 (1982). The FTCA's local law requirement may not be circumvented merely by casting the alleged constitutional wrong as negligence."

Art Metal, at 1160.

Similarly, defendant contends the federal regulations cited by plaintiff in his complaint do not embody duties recognized under Alabama tort law.

In Cecile Industries, Inc. v. United States, 793 F.2d 97 (3rd Cir. 1986) the plaintiff, a clothing and equipment manufacturer for agencies of the federal government, brought an action against the United States under

the FTCA contending that an agency of the Department of Defense subjected them to a de facto debarment from bidding for contracts. They asserted, again as in the instant case, that the agency failed to abide by the applicable debarment regulations, thereby depriving plaintiff of due process.

The Third Circuit in Cecile, reiterated the well-established principle that a claim under the FTCA may not be based on alleged breaches of a duty arising solely out of federal law when there is no corresponding duty under state tort law. Id. at 99.

The plaintiffs in Cecile argued, however, that the government's violation of the applicable federal

regulations constituted negligence per se, citing as support Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975). The Court stated that the failure to follow a federal regulation may be negligence per se only if, under state law criteria, it would be considered negligence per se. Cecile, at 99.

The Cecile Court noted that in Myers, the parties had never addressed whether a violation of federal regulations would be negligence per se under state law, and that the Myers court remanded that case to the district court for such a determination. In Cecile, however, the parties addressed the state law on the theory of negligence per se. The Cecile Court noted that these cases

involved statutes and regulations in the traditional negligence context of automobile and industrial accidents. The Court, finding that a violation of the federal regulations was not negligence per se under state law, affirmed the district court's dismissal for lack of subject matter jurisdiction. A review of Alabama law reveals that the theory of negligence per se is applied only in traffic violation cases; thus, violations of federal regulations would not be negligence per se under Alabama law and would not provide a basis for jurisdiction under the FTCA under Alabama law and would not provide a basis for jurisdiction under the FTCA.

It appears that plaintiff alleges that the government has committed

constitutional torts by denial or equal protection and due process under the law.

> "Federal constitutional torts, however, are not within the scope of the FTCA. That statute waives the sovereign immunity of the United States for the tortious acts of its employees only "if such torts committed in the employ of a private person would have given rise to liability under state law..." By definition, constitutional torts are not based on state law.
>
> "[T]he waiver of sovereign immunity contained in [the FTCA] is limited to a tort cause of action cognizable under state law".

McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied 107 S.Ct. 883 (1987). See also, Boda v. United States, 698 F.2d 1174, 1176 (11th Cir. 1983).

Plaintiff also alleges misrepresentation by government employees in regard to his company's contract performance record. Any

claim for misrepresentation is expressly barred under the Federal Tort Claims Act. 28 U.S.C. Section 2680(h).

Defendant submits, however, that the true essence of plaintiff's complaint is a claim for damages for the government's alleged tortious interference of plaintiff's contract rights. Plaintiff specifically charges that the government's actions interfered with his prospective economic advantage. Tortious interference of contract and tortious interference with prospective economic advantage are one in the same, however, and both are barred by the FTCA. 28 U.S.C. Section 2680(h).

> "To hold that interference with prospective advantage does not arise out of interference with contract rights under section 2680(h) would

> subject the government to liability if its employees interfered with the plaintiff's mere expectation of entering a contract, but not if they interfered with a contract already in existence. Such a result would be illogical and contrary to the 'words and reason of the exception.' Kosak v. United States, ___ U.S. ___, 104 S.Ct. 1519, 1523 n.9, 79 L.Ed.2d 860 (1984) (citation omitted). See 2. L. Jayson, Handling Federal Tort Claims Section 260.06 13-105 (1984). We therefore hold, as has nearly every court that has addressed this issue, that Art Metal's claims for interference with prospective advantage are barred as claims arising out of interference with contract rights."

Art Metal, at 1155.

Finally, the defendant contends that decisions with regard to government contracting involved the exercise of a discretionary function; therefore, any claim against the government based on such decisions is expressly barred under Section 2680(a) of the FTCA.

In conclusion, defendant contends

that the plaintiff has not satisfied the requirement of showing that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b). "[S]urely a litigant cannot circumvent the [FTCA] by the simple expedient of drafting in terms of negligence a complaint that in reality is a claim as to which the United States remains immunized." Johnson v. United States, 547 F.2d 688, 691-92 (D.C.Cir. 1976). Therefore, defendant respectfully requests this Court to dismiss plaintiff's action for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), in that the allegations of the complaint,

misrepresentation and tortious interference with contract rights, are excepted from the provisions of the FTCA. 28 U.S.C. Section 2680(h). In the alternative, defendant respectfully requests this Court to dismiss plaintiff's action for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6), in that the allegations of the complaint do not state a tort under Alabama law as required by the FTCA. 28 U.S.C. Section 1346(b).

FRANK W. DONALDSON
United States Attorney

Signature
HERBERT J. LEWIS, III
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of

the foregoing has been served upon the following by mailing same by First Class United States mail, properly addressed and postage prepaid on the 17th day of August, 1987:

Don A. Howard, Esquire
3307 Bob Wallace Avenue,
Suite One
Huntsville, AL 35805

Signature
HERBERT J. LEWIS, III
Assistant United States
Attorney

4. Petitioner's Complaint in the United States District Court in the Northern District of Alabama, Northeastern Division Filed June 16, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

COMPLAINT

BASIS FOR JURISDICTION

1. This action arises under 28 U.S.C. Section 1346(b), commonly known as the Federal Tort Claims Act, as hereinafter more fully appears.

FACTS

2. Plaintiff resides in Meridianville, Madison County,

Alabama, and is the sole owner of Ikard Manufacturing Company, also located in Meridianville, Alabama. Ikard Manufacturing Company produces and manufactures items and products primarily to the United States Army Missile Command located at Redstone Arsenal, Alabama. By virtue of, and in reliance upon, an approximate 15 to 20 year history of producing parts for the United States Army and establishing its operations to meet the unique and stringent requirements of Department of Defense Agencies, Ikard Manufacturing Company's primary customer is the United States Army Missile Command at Redstone Arsenal, Alabama.

3. This action is a result of the wrongful de facto debarment of

both Jerry W. Ikard and Ikard Manufacturing Company from at least 1981, the wrongful suspension of Ikard Manufacturing Company and Jerry W. Ikard dated June 18, 1984 and received on or about June 20, 1984, the wrongful debarment of Ikard Manufacturing and Jerry Ikard on January 10, 1985, the wrongful cancellation of the security clearances of Ikard Manufacturing Company and Jerry W. Ikard, and the interference with prospective advantage of Jerry W. Ikard and Ikard Manufacturing Company by officers, employees and attorneys of the Untied States Army, a number of whom are employees and attorneys of the U.S. Army Missile Command, and employees of the Defense Contract Administration

Service (DCAS) of the Defense Logistics Agency (DLA).

4. In late 1981, a list was promulgated by employees of the Procurement and Production Directorate of the U.S. Army Missile Command which contained the names of contractors alleged to be "problem contractors." This list contained the name of Ikard manufacturing Company. Supervisors of personnel distributing this list told their employees to avoid awarding contracts to the firms listed if at all possible. Such promulgation of this list, and the accompanying instructions, is in violation of Subpart 9.4 of the Federal Acquisition Regulation (FAR) and of the Defense Acquisition Regulation (DAR), the procurement regulations preceding the

FAR.

5. In compiling information and data on which the U.S. Army Missile Command based its recommendation to the Army Debarring Official to suspend and debar Ikard Manufacturing Company, employees of that Command negligently withheld relevant material evidence from both the Army Debarring Official and Ikard Manufacturing Company and its attorneys. The evidence withheld demonstrated that other U.S. Army Missile Command Contractors had performance records and contract delinquency histories similar to or worse than Ikard Manufacturing Company. It also showed that Ikard manufacturing Company was singled our for an excessively large number of pre-award surveys as compared to other

U.S. Army Missile Command Contractors with similar performance records. In best cases, Ikard manufacturing Company received almost 1000% (a magnitude of 10 times) more pre-award surveys than the contractor with the next largest number of surveys. These pre-award surveys contributed to Ikard Manufacturing Company's delinquency rate due to the need to expend scarce management production time to their accomplishment. On information and belief, Army Missile Command employees negligently withheld such relevant information included the attorneys of that Command.

6. When recommending a course of action to the Army Debarring Official in regard to Ikard Manufacturing Company's request to reconsider its

duration of debarment, U.S. Army Missile Command employees and attorneys negligently gave erroneous information to the Army Debarring Official in regard to Ikard Manufacturing Company's performance history since January 10, 1985. A number of contracts listed as terminated for default or scheduled for default termination, were, in fact, not. In addition, a large percentage of those contracts actually defaulted were of dubious legality.

7. Ikard Manufacturing Company and Jerry W. Ikard were suspended and debarred pursuant to official U.S. Army Administrative hearings for a period of nineteen (19) months. This period of time is excessive when compared to those periods of

suspension and debarment of certain large business firms, who were alleged to have defrauded the United States of America. Ikard Manufacturing Company's alleged wrongs dealt with timely delivery. Several of Ikard Manufacturing Company's small and large business competitors with similar or worse delinquency records were not and have not been either suspended or debarred.

8. Under 15 U.S.C. Section 637(b)(7), the Small Business Administration is the sole and final determinant of the responsibility of small business concerns. In recommending the debarment of Ikard Manufacturing Company and in making the decision to debar Ikard Manufacturing Company, U.S. Army

officials and employees specifically found and determined Ikard Manufacturing Company and Jerry W. Ikard to be nonresponsible as Government contractors. U.S. Army Missile Command employees and attorneys negligently failed to forward their debarment recommendation and finding of nonresponsibility to the Small Business Administration for its final determination of the responsibility of Ikard Manufacturing Company and Jerry W. Ikard.

9. In May, 1985, the Defense Investigative Service invalidated the security clearances of Jerry W. Ikard and Ikard Manufacturing Company. In October, 1985, they were cancelled. The invalidation and cancellation was based upon information received from

the U.S. Army Missile Command that, as of May 14, 1985, all of Ikard Manufacturing Company's contracts with the U.S. Army Missile Command had either been delivered or terminated for default. This information was, as the Army's own records indicate, in error. Ikard Manufacturing Company had active contracts throughout its debarment. The submission of erroneous information prohibited Ikard Manufacturing Company from receiving a contract form a prime contractor with whom negotiations were being conducted.

10. Ikard Manufacturing Company and Jerry W. Ikard's security clearances were not restored until June 2, 1986, though Ikard Manufacturing Company was bidding on

classified solicitations and had requested its restoration on January 10, 1986. Other contractors, with no history of a security clearance, had their clearances processed and approved in a matter of days as opposed to Ikard Manufacturing Company's delay of four (4) months.

11. In December, 1986, pursuant to a review of Request for Proposals (RFP) DAAH01-87-R-0091, in accordance with applicable regulations, the Small Business Administration (SBA) Procurement Center Representative for the U.S. Army Missile Command recommended that Ikard Manufacturing Company be solicited for the Army's requirement for repair and rebuild of 332 TOW-2 Missile System Cable Assemblies. The SBA Procurement

Center Representative included Ikard Manufacturing Company's name on a recommended Small Business Source List for the referenced solicitation in order to give Ikard Manufacturing Company the opportunity to bid and propose for that requirement. The Contract Specialist for the U.S. Army Missile Command stated that Ikard Manufacturing Company would not be solicited for the requirement because Ikard Manufacturing Company had been "black-listed." After the Procurement Center Representative told the Contract Specialist that the period of Ikard Manufacturing Company's formal debarment had ended, the Contract Specialist stated that Ikard Manufacturing Company was on the U.S. Army Missile Command Contractors

Requiring Special Attention (CRSA) list and the DCAS Contractor Alert List (CAL). Correspondence pertaining to these lists which has been issued by the Army and DCAS state that neither list is to be used to deny contract awards to contractors or to be utilized for determinations of whether contractors are responsible. Pursuant to the Small Business Act, only the Small Business Administration may determine the responsibility of Small Business Contractors. The agencies promulgating the lists have stated in correspondence that the purpose of such lists is to bring attention to particular contractors and require a review by higher officials. After review of the Contract Specialist's actions by her

supervisor, a U.S. Army Missile Command Contracting Officer, Ikard Manufacturing Company's name was removed from the list of contractors to be given an opportunity to bid on this requirement. This action, in part, prompted the SBA Procurement Center Representative to forward a letter to his regional office detailing "black-listing" of certain small business contractors by the U.S. Army Missile Command and of the pervasive fear of retribution by small business contractors who attempted to protect their rights. By memorandum dated January 30, 1987, the U.S. Army Missile Command stated that the CRSA List was not a "black-list" and that "the program should not be thought of nor referred to in that light." The

memorandum also warned against viewing the "CRSA program as a disciplinary action." By memorandum dated September 3, 1986, Ikard Manufacturing Company had bee removed from the CRSA List because of "performance improvements."

STATEMENT OF LEGAL POSITION

12. Plaintiff avers that the "black-listing" and de facto debarment of Ikard Manufacturing Company and Jerry W. Ikard deprive it of property and liberty interest without due process of law as required by Article I, Section 6 of the Constitution of Alabama of 1901 and the Fifth Amendment of the United States Constitution, and violate Federal Procurement Regulations, particularly Subpart 9.4 of the Federal Acquisition

Regulations (FAR), and the Small Business Act, and that this violation of law is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

13. Plaintiff avers that the negligent withholding of evidence and submission of erroneous information in regard to the suspension and debarment of Ikard Manufacturing Company deprived it of property without due process of law, a right protected under Article I, Section 6 of the Alabama Constitution of 1901 and the Fifth Amendment of the United States Constitution. Further, Plaintiff avers that the negligent withholding of relevant evidence deprived the debarment hearing of any fundamental fairness and prevented it from meeting

the requirement of a due process hearing, and that this violation of law is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

14. Plaintiff avers that the inequitable debarment and suspension of Ikard Manufacturing Company for a period of nineteen (19) months as opposed to shorter periods of time or no debarment of Ikard Manufacturing Company's competitors with similar or worse delinquency records is a violation of the Equal Protection of Laws as provisions of Sections 1, 6 and 22 of Article I of the Alabama Constitution of 1901, and Subpart 9.4 of the Federal Acquisition Regulations (FAR), and is error, and constitutes negligence and negligence per se under

the laws of the State of Alabama.

15. Plaintiff avers that the negligent failure of employees and officials of the U.S. Army to forward their determination of the nonresponsibility of Ikard Manufacturing Company and Jerry W. Ikard to the Small Business Administration (SBA) is a violation of the Small Business Act, and the Federal Acquisition Regulations, and is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

16. Plaintiff avers that the negligence and submission of erroneous information to the Defense Investigative Service prohibited Ikard Manufacturing Company from receiving a contract from a Prime Contractor with

whom negotiations were being conducted and that such negligence constitutes interference with prospective advantage.

17. Plaintiff avers that the delay and negligence in diligently processing Ikard Manufacturing Company's security clearance is a violation of the Equal Protection of the Laws provisions of Article I, Sections 1, 6, and 22 of the Alabama Constitution of 1901, the Fifth Amendment of the United States Constitution and is error, and constitutes negligence and negligence per se under the laws of the State of Alabama.

18. Plaintiff avers that the negligence complained of hereinabove is both the cause in fact and

proximate cause of property damage to Ikard Manufacturing Company and Jerry W. Ikard. The employees and officers of the U.S. Army and the Defense Contract Administration Service (DCAS) of the Defense Logistics Agency (DLA) whose actions are alleged to be negligent herein were acting in the scope of their employment by Defendant.

19. Plaintiff avers that the employees and officers of the U.S. Army and the Defense Contract Administration Service (DCAS) of the Defense Logistics Agency (DLA) whose actions are complained of hereinabove failed to exercise the degree of care required or prescribed by the laws of the State of Alabama.

20. Plaintiff avers that the

negligence complained of herein, which were acts or omissions of attorneys who were employed by or were officers of the U.S. Army, is a violation of Section 34-3-20(1) of the Code of Alabama (1975), and, as such, constitutes negligence and negligence per se under the laws of the state of Alabama.

21. Plaintiff avers that the acts or omissions on the part of Defendant which were acts or omissions of attorneys who were employed by or were officers of the U.S. Army were error, constituted negligence, and departed from and fell below the standard of care required of attorneys practicing law in Madison County, Alabama, or in similar areas.

22. Plaintiff avers that

Defendant, and its employees, officers and attorneys, owed Plaintiff the duty to comply with all regulations, statutes and Constitutional provisions applicable to determinations of responsibility, suspension, debarment, and Federal procurement.

23. Plaintiff presented his claim to the United States Army on June 18, 1986, which claim was denied by letter dated December 31, 1986.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiff demands judgment against the Defendant for the sum of Five Million Dollars ($5,000,000.00) and costs.

Signature

DON A. HOWARD
Attorney for Plaintiff
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3307 Bob Wallace Ave.,
Suite One

Huntsville, AL 35805
(205) 533-2201

Signature
Morris J. Brooks, Jr.
Attorney for Plaintiff
9009 Randall Rd.
Huntsville, AL 35802

Plaintiff demands trial by jury.

Signature
DON A. HOWARD
Attorney for Plaintiff

Signature
Morris J. Brooks, Jr.
Attorney for Plaintiff

5. Defendant-Respondent's Motion to Dismiss in the United States District Court in the Northern District of Alabama, Northeastern Division. Filed August 17, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JERRY W. IKARD, d/b/a IKARD MANUFACTURING COMPANY,

Plaintiff,

vs. CV NO. 87-HM-5267-NE

UNITED STATES OF AMERICA,

Defendant,

DEFENDANT'S MOTION TO DISMISS

Comes now the defendant United States of America, by and through its attorney, the United States Attorney for the Northern District of Alabama, and pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, moves this Honorable Court to dismiss

this action, and in support hereof states as follows:

1. Plaintiff asserts jurisdiction under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b).

2. Plaintiff has failed to satisfy the FTCA requirement of showing that "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. Section 1346(b).

3. Alternatively, Plaintiff's allegations all rise out of tortious interference with contract rights and misrepresentation, both of which are expressly excepted from the provisions of the FTCA, 28 U.S.C. Section 2680(h).

4. Furthermore, plaintiff's

allegations involve the Government's exercise of a discretionary function and are subject to the exception under 28 U.S.C. Section 2680(a).

WHEREFORE, for the foregoing reasons, it is respectfully submitted that plaintiff's suit be dismissed. The Court is respectfully referred to a memorandum of law submitted in support hereof.

FRANK W. DONALDSON
United States Attorney

Signature
HERBERT J. LEWIS, III
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by mailing same by First Class United States mail, properly addressed and postage prepaid on the 17th day of August, 1987:

Don A. Howard, Esquire
3307 Bob Wallace Avenue,
Suite One
Huntsville, AL 35805

Signature

HERBERT J. LEWIS, III
Assistant United States
Attorney

6. Lengthy Statutes and Federal Acquisition Regulations

15 U.S.C. 637(a)(1):

(1) It shall be the duty of the Administration and it is empowered, whenever it determines such action is necessary or appropriate---

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific

Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department of agency by the Administrator. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(B) to enter into contracts with such agency as shall be designated by

the President, to furnish articles, equipment, supplies, services, or materials, or to perform construction work for such agency. In any case in which the Administration certifies to any officer of such agency having procurement powers that the Administration is competent and responsible to perform any specific procurement contract to be let by any such officer, such officer shall let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. If the Administration and such procurement officer fail to agree on such terms and conditions, either the Administration or such officer shall

promptly notify, in writing, the head of such agency. The head of such agency shall have five days (exclusive of Saturdays, Sundays, and legal holidays) to establish the terms and conditions upon which such procurement contract may be let to the Administration, and shall communicate in writing to the Administration the terms and conditions so established. Within five days (exclusive of Saturdays, Sundays, and legal holidays) after the receipt of such written communication, the Administration shall decide whether to perform such procurement contract or withdraw its prior certification that the Administration is competent and responsible to perform such contract; and

(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts. No contract may be entered into under subparagraph (B) after September 30, 1988.

15 U.S.C. 637(b)(7):

(b) It shall also be the duty of the Administration and it is empowered,

whenever it determines such action is necessary---

(7)(A) to certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small-business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such

contract without referring the matter for a final disposition to the Administration.

(B) If a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to the provisions of section 35(a) of Title 41, he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final disposition, in which case the Administration may certify the small business concern only if the Secretary

of Labor finds the small business concern not to be in violation.

(C) In any case in which a small business concern or group of such concerns has been certified by the Administration to be a responsible or competent Government contractor as top a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and shall let such Government contract to such concern or group of concerns without requiring it to meet any other requirement of responsibility or eligibility.

Notwithstanding the first sentence of this subparagraph, the Administration may not establish an

exemption from referral or notification or refuse to accept a referral or notification from a Government procurement officer made pursuant to subparagraph (A) or (B) or this paragraph, but nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed.

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United

States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680(a):

The provisions of this chapter and section 1346(b) of this title shall not apply to---

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in

the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. 2680(h):

The provisions of this chapter and section 1346(b) of this title shall not apply to---

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or

omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Title 48, Code of Federal Regulations: FAR 9.402(b):

The serious nature of debarment and

suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

FAR 9.406-2 Causes for Debarment:

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) Conviction of or civil judgment for--(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as--

(1) Willful failure to perform in accordance with the terms of one or

more contracts; or

(2) A history of failure to perform, or of unsatisfactory performance or, one or more contracts.

(c) Any other cause or so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor FAR 9.406-3(b) Procedures. Decision-making process.

(1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative,

information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also--

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

FAR 9.407-2 Causes for Suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, or--

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the

present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

Title 48, Code of Federal Regulations: DOD FAR Supplement 9.472-2: Contents of Reports.

Each report prepared pursuant to this subsection shall contain the name and telephone number of the individual assigned to the case as the point of contact for the activity making the

report, and shall include substantially the following information, where available:

(a) name and address of the contractor;

(b) names of the principal officers, partners, owners, or managers;

(c) all known affiliates, subsidiaries, or parent firms, and the nature of the affiliation;

(d) description of the contract or contracts concerned, including the contract number, and all office identifying numbers of symbols, the amount of each contract, the degree of completion, the amount paid the contractor and the amount still due, and the percentage of work to be completed;

(e) the status of the vouchers;

(f) whether the contract has been assigned pursuant to the Assignment of Claims Act, and if so assigned, the name and address of the assignee and a copy of the assignment;

(g) whether any other contracts are outstanding with the contractor or any of his affiliates, and if so, the amount of such contracts, whether they are assigned pursuant to the Assignment of Claims Act, and the amounts paid or due on such contracts;

(h) a complete summary of all pertinent evidence;

(i) a recommendation as to the continuation of all current contracts with a full explanation of the reason for such recommendation, or if no recommendation is made, the reason therefor;

(j) an estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate;

(k) the comments and recommendations of the contracting officer and of each successive echelon as to (1) whether the contractor should be suspended or debarred, (2) whether any limitations should be applied to such action, and (3) the period of any debarment; and,

(l) as an enclosure, a copy of the contract (or contracts) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation, such as affidavits, copies of investigative

reports and certified copies of indictments and judgments.

Army FAR Supplement 9.493. Debarment and Suspension Procedures.

(a) Purpose. The purpose of these procedures is to ensure fair and uniform treatment of contractors suspended or proposed for debarment by the Army. These procedures supplement those established in Part 9, Subpart 9.4 of the Federal Acquisition Regulation (FAR).

(b) Notification. Contractors will be notified of suspension or proposed debarment in accordance with FAR 9.406-3(c) and 9.407-3(c). Contractors routinely will be furnished a copy of the entire record which formed the basis for the decision by the Assistant Judge

Advocate General for Military Law (AJAG). If there is reason to withhold from the contractor any portion of that record, the contractor will be informed of what is withheld and the reasons for such withholding.

(c) Nature of Proceeding. There are two distinct proceedings which may be involved in the suspension or debarment process. The first is the presentation of matters in opposition to the suspension or proposed debarment by the contractor. The second is fact-finding, which occurs only in cases in which the contractor's presentation of matters in opposition raises a genuine dispute over material facts. In a suspension action based upon an indictment and in a proposed debarment action based upon

a conviction, there is no regulatory right to a fact-finding proceeding, as the fact of the indictment or conviction is sufficient basis for the proposed action. To the extent that the proposed action stems from the contractor being an affiliate of the individual or firm indicted or convicted, fact-finding is permitted, but only if a genuine dispute of fact is raised as to the question of affiliation.

(d) Presentation of Matters in Opposition.

(1) In accordance with FAR 9.406-3(c) and 9.407-3(c), matters in opposition may be presented in person, in writing, or through a representative. Matters in opposition may be presented through any

combination of the foregoing methods, but if a contractor desires to present matters in person or through a representative, any written matters must be delivered at least five working days in advance of the oral presentation. With the exception of the foregoing, all matters in opposition must be presented in a single proceeding. Such a proceeding is nonadversarial in nature, although the AJAG or any person he designates may ask questions of the person making or assisting in making the presentation. The presentation will be scheduled for a date which is within 10 working days of the date requested by the contractor. In accordance with FAR 9.406-3(c) and 9.407-3(c), the contractor has 30 days

from receipt of the notice of suspension or proposed debarment to submit matters in opposition.

(2) A verbatim transcript of the oral presentation will be prepared. A copy will be made available to the contractor at his request.

(3) The opportunity to present matters in opposition to debarment includes the right to present matters concerning the duration of debarment.

(4) Within five working days following the submission of matters in opposition, the contractor may submit to AJAG a written statement outlining the material fact or facts, if any, believed to be in dispute.

(e) Fact-Finding.

(1) In cases in which fact-finding is authorized, AJAG will determine

within 30 working days of the contractor's presentation of matters in opposition whether the presentation has raised a genuine dispute over one or more material facts. He will determine the material fact or facts, if any, as to which a genuine dispute has been raised. Upon determining such a dispute exists, he will appoint a military judge made available by the United States Army Trial Judiciary to conduct a fact-finding proceeding, unless such proceeding is unnecessary because AJAG has decided against debarment or continued suspension based upon the contractor's presentation of matters before him.

(2) The designated military judge will establish a date for a fact-finding hearing. This date will be

within 45 working days of the date of the contractor's presentation of matters in opposition, unless the contractor requests a latter date. The delayed hearing will occur within 60 working days of the date of the contractor's presentation of matters in opposition.

(3) Wile formal rules of evidence do not apply in fact-finding proceedings, certain basic principles will be observed:

(A) The military judge, in advance of the proceeding, will receive from AJAG a description of the general nature of the case and the material fact or facts he has determined to be in dispute.

(B) The proceeding before the military judge is limited to a

resolution of the fact or facts in dispute as determined by AJAG.

(C) The burden is on the government to establish the disputed fact or facts by a preponderance of the evidence.

(D) While no subpoena power exists to compel attendance of witnesses, Department of Defense employees whose testimony is critical to establishing the fact or facts in dispute will testify in person if they are employed in the area in which the fact-finding proceeding takes place and are otherwise available to testify. If such employees are not available to testify, their sworn statements may be used in lieu of their testimony and will be given appropriate weight by the military judge. The military

judge's decision on the question of availability is final.

(E) Hearsay evidence may be used and will be given appropriate weight by the military judge.

(F) All witnesses, whether presented by the government or the contractor will be placed under oath and are subject to cross-examination.

(G) Administrative arrangements, costs, and fees for all witnesses, including Department of Defense employees, desired by the contractor are the contractor's sole responsibility. Permission for Department of Defense employees to appear and testify will not be unreasonably withheld.

(4) A verbatim transcript of the proceedings will be prepared. A copy

will be made available to the contractor at his request.

(5) The military judge will prepare written findings of fact, limited to the fact or facts in dispute, and provide them along with a copy of the transcript to AJAG within 15 working days of the conclusion of the proceedings. A copy of the findings of fact will be provided to the contractor.

(6) AJAG will notify the contractor of debarment or continued suspension within 10 working days of receipt of the findings of fact. His decision will be based upon the entire administrative record.

(f) Time Requirements. All time requirements set forth in these procedures may be extended by AJAG,

but only for good cause.